

Matthews, Esquire. M. John Bowen, Jr. Esquire, and Margaret M. Fox, Esquire, represented HTCC. Elliott F. Elam, Jr., Esquire, represented the Consumer Advocate and Jocelyn D. Green, Staff Counsel, represented the Commission Staff.

At issue is whether the Commission should grant AT&T's request and dismiss HTCC's complaint for failure of HTCC to raise any legal justification or factual basis to compel AT&T to purchase switched access services offered by HTCC. The Commission finds that, as a matter of law, the Complaint of HTCC should not be dismissed and AT&T's Motion to Dismiss should be denied.

II. ARGUMENTS OF THE PARTIES

The basis of AT&T's Motion to Dismiss is that HTCC has no legal right to force AT&T to become its customer and make AT&T purchase switched access services from HTCC. More specifically, AT&T argues that the real crux of the Motion To Dismiss hearing is whether AT&T has a legal obligation to purchase access services from HTCC at any price, reasonable or not. Additionally, it is AT&T's position that the statutes relied on by HTCC fail to support HTCC's claims for the same reason. According to AT&T, 47 U.S.C. §§201(a), 202(a), and 251 (a) and S.C. Code Ann. §58-9-250 (1976) pertain to the various obligations of a provider of telecommunications services not the obligation to purchase services. AT&T states that its services are available to any long distance end-user; however, the long distance services are not available via HTCC if HTCC decides to block the AT&T traffic. Furthermore, it is AT&T's position that it does not deny service to any potential customer. AT&T also argues that it has fully met its interconnection requirement with HTCC as required by federal law. AT&T also objects to HTCC's

access pricing structure; it is AT&T's position that HTCC's pricing structure for access charges will result in long distance carriers and end-users subsidizing HTCC's local service.

HTCC is a wholly-owned CLEC of Horry Telephone Co-op. According to HTCC, the access charges it proposes to charge AT&T are identical to the access charges AT&T pays Horry Telephone Co-op and other independent telephone companies within the State of South Carolina. It is HTCC's position that because AT&T is paying identical access charges to Horry Telephone Co-op and similar access charges to other independent telephone companies in the State, then HTCC's rates should not be viewed as unreasonable. HTCC argues the Commission should decide the appropriate rate if the Commission finds HTCC's access pricing structure inappropriate.

Furthermore, it is HTCC's position that both HTCC and AT&T are common carriers and therefore both have a duty to interconnect. According to HTCC, AT&T will not purchase access services from HTCC because HTCC's rates do not mirror GTE South, Inc., the incumbent local exchange carrier in HTCC's service area. It is HTCC's position that HTCC should not be forced to structure its rates like GTE's. It is also HTCC's position that it is anticompetitive to force HTCC or any other CLEC to structure its rates identical to the ILEC in the CLEC's service area.

The Consumer Advocate intervened to represent the customers of HTCC who may want to choose AT&T as their long distance provider. It is the Consumer Advocate's position that all customers, whether they choose an ILEC or a CLEC, should have access to the full range of long distance carriers. Additionally, the Consumer

Advocate argues that AT&T's Motion to Dismiss is not proper as the issue in this case is whether HTCC's access rates are reasonable and AT&T has not illustrated in its pleadings that HTCC's rates are unreasonable. Therefore, a question of fact remains as to whether HTCC's rates are reasonable and the Commission should schedule a hearing and deny AT&T's Motion to Dismiss.

CONCLUSIONS OF LAW

When considering a Motion To Dismiss, a court should consider only the allegations set forth on the face of the plaintiff's complaint. Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137, 139 (1999). A Motion To Dismiss should not be granted "if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 433 (Ct. App. 1997). HTCC alleges in its complaint that AT&T refuses to purchase reasonably-priced intrastate switched access services from HTCC. HTCC also alleges that because AT&T has refused to purchase reasonably priced switched access services from HTCC, AT&T is in violation of S.C. Code Ann. §58-9-250 (1976) and 47 U.S.C. §§201(a), 202(a), and 251(a). The application of the alleged facts in this case to the statutes referred to by HTCC in its complaint cannot be fully presented, addressed, or examined without a merits hearing. The issues in this case warrant the Commission scheduling a hearing so that the facts can be explored in their entirety by all parties in the case.

Additionally, AT&T's Motion to Dismiss should be denied as this case involves novel issues which have not appeared or been presented to this Commission in a formal

hearing. See, Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907, 909 (1995)(novel issues should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss); Keiger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792, 794 (Ct. App. 1997)(novel issues should not be summarily decided on a 12(b)(6) motion). We deny AT&T's Motion to Dismiss as a hearing should be scheduled to gather more factual information. This case is simply not a good candidate for dismissal. The development of a record would aid in the resolution of this case and permit the Commission to make an informed sound decision after reviewing a fully developed record.

IT IS THEREFORE ORDERED:

1. That AT&T's Motion to Dismiss is denied.
2. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)